C. A. BRAUN

IBLA 88-461 Decided May 16, 1991

Appeal from a decision of the Idaho State Office, Bureau of Land Management, declaring mining claims null and void ab initio. IMC 128855 through IMC 128882.

Affirmed in part; set aside in part.

1. Mining Claims: Withdrawn Land--Withdrawals and Reservations: Reclamation Withdrawals

A decision declaring mining claims null and void ab initio will be set aside where BLM's decision relies upon a Secretarial order withdrawing from location all islands in the Snake River and it is unclear from the record whether the lands claimed were ever part of an island included in the withdrawal.

APPEARANCES: C. A. Braun, Idledale, Colorado, pro se.

OPINION BY ADMINISTRATIVE JUDGE BYRNES

C. A. Braun has appealed from a decision of the Idaho State Office, Bureau of Land Management (BLM), dated May 13, 1988, declaring null and void ab initio seven placer mining claims located on November 5, 1987, in Bingham and Power Counties, Idaho.

BLM's decision set forth a variety of reasons for the agency's action. Appellant's Red #20 claim was found to be located wholly within lands described by Secretarial order of January 27, 1904. This order withdrew such lands from mineral entry, BLM stated.

Appellant's Barf #1 and Barf #2 claims were each found to lie partly within patent No. 249663, which issued on February 26, 1912, without a reservation of minerals by the United States. Each of these claims was also found to lie partly within lands described by Secretarial order of July 5, 1921. This Secretarial order withdrew "from mineral entry" lots
1-5, sec. 31, and lots 1-4, sec. 32, T. 4 S., R. 32 E., Boise Meridian, and all islands in the Snake River within that township (Decision at 2).

In addition, BLM found that the Barf #2 claim was located partly within land described by Executive order of July 30, 1869, and Secretarial order of October 22, 1920. The effect of these orders, BLM held, was to withdraw such lands from mineral entry.

Appellant's Barf #3 and Barf #4 claims were each found to lie partly within patent No. 4377, which issued on December 1, 1904, without a reservation of minerals by the United States. Each of these claims was also found to lie partly within Secretarial order of July 5, 1921, described above. BLM's decision further noted that part of the Barf #4 claim was subject to Executive order of July 30, 1869, and Secretarial order of October 22, 1920, supra.

Finally, BLM found that the Barf #5 and Barf #8 claims were each located partly within lands described by Secretarial order of July 5, 1921, and by Executive order of July 30, 1869 and Secretarial order of October 22, 1920. The effect of these orders, BLM held, was to withdraw such lands from mineral entry.

In his statement of reasons, appellant contends that the Secretarial orders and Executive orders of the 1920's have no application for the 1980's. These orders were issued "for freeboard, or excess water levels, above dam or spillway elevation of 4354 feet elevation for the American Falls Reservoir." These water levels have never been met, appellant states, and these projections are not "in the realm of reality." Use of these lands for productive purposes has been frustrated by these outdated orders issued more than a half-century ago, Braun charges.

In addition to these broad charges, appellant focuses upon Secretarial order of July 5, 1921. This order withdrew "from public entry, under the first form of withdrawal, as provided in Sec. 3, Act of June 17, 1902 (32 Stat. 388) * * * [a]ll islands in the Snake River" in T. 4 S., R. 33 E., inter alia. BLM's master title plat shows a land mass denoted Tucker Island in secs. 31 and 32 of this township. Parts of the Barf #1-#5 claims lie within the boundaries of this land mass.

Challenging BLM's finding that his claims are within the terms of this withdrawal, Braun states:

> The so-called Tucker island (McTucker Island on the topographic map) is not insular in the respect that it is continually surrounded by water. Thus your arguments concerning the status of "islands in the Snake River" is [sic] not valid. The apparently insular situation is in fact caused by a spring that is the origin of McTucker Creek; this spring is independent of the Snake River.

To begin, we note that appellant's statement of reasons does not address BLM's finding that certain of his claims lie partly within patented lands in which the United States retains no mineral interest. In earlier correspondence, appellant states that he has no intention to lay claim to

any "unopen lands, either public or private," thus raising a question of the situs of his claims on the ground. This issue cannot be settled on the basis of the record currently before the Board. Suffice it to say, however, that to the extent that a claim of appellant occupies patented lands in which the United States retains no mineral interest, such claim is pro tanto null and void. Nels Swanberg, 74 IBLA 249 (1983); Silver Spot Metals, Inc., 51 IBLA 212 (1980). To the degree the record permits our review, the Barf #1 claim and possibly the Barf #3 claim are located partly within patented lands in which the United States retains no mineral interest.

Braun's suggestion that the withdrawals of the 1920's are outdated and, therefore, ineffective to withdraw land from location has been previously addressed by this Board. Thus in Ronald W. Ramm, 67 IBLA 32 (1982), the Board held that lands withdrawn from mining by a first form reclamation withdrawal remain unavailable regardless of whether the lands are presently being used for the purpose contemplated by the withdrawal. Lands withdrawn from entry under the public land laws remain so withdrawn until there is a formal revocation or modification of the order of withdrawal. William C. Reiman, 54 IBLA 103 (1981).

Secretarial order of July 5, 1921, effected a first form reclamation withdrawal under section 3 of the Reclamation Act. As noted above, this order withdrew "from public entry, under the first form of withdrawal" lands described therein. Secretarial order of October 22, 1920, reserved lands within the Fort Hall Indian Reservation from location, entry, sale, allotment, or other appropriation for a reservoir site pursuant to section 13 of the Act of June 25, 1910, ch. 431, 36 Stat. 855. 1/

With respect to the Red #20 claim, we do not find support in the record for BLM's conclusion that Secretarial order of January 27, 1904, withdrew lands occupied by this claim from mineral entry. At best, the record shows that lands occupied by this claim were recommended for withdrawal from public entry under the first form of withdrawal. The record does not reveal whether the recommendation was accepted. BLM's decision must, therefore, be set aside insofar as it relied upon the Secretarial order of January 27, 1904, to invalidate the Red #20 claim.

[1] Appellant's contention that Tucker Island is not an island raises a question whether Secretarial order of July 5, 1921, withdrew from location those lands occupied by parts of the Barf #1-#5 claims. The master title plat for T. 4 S., R. 33 E. appears to agree with Braun that lands denoted Tucker Island on the plat are not presently an island. This plat shows that lots 11 and 12 in sec. 32 connect patented uplands to an area denoted Tucker Island. The area denoted Tucker Island consists of lots 8-12 in sec. 31 and lots 8-10 in sec. 32, T. 4 S., R. 33 E.

1/ Identical lands in secs. 31 and 32 were described by this Secretarial order and Executive order of July 30, 1869. The Executive order designated a reservation for the Bannock Indians.

We are left to speculate whether this area was an island at the time Secretarial order of July 5, 1921, was issued or whether it was ever, in fact, an island. The record does not disclose in what year lots 11 and 12 formed in sec. 32 to effect a land bridge.

Appellant's statement of reasons is unhelpful, but the record does contain an Order of Judgment in Christman & Hopkins, Inc. v. Kleppe, Civ. No. 4-76-32 (D. Idaho June 22, 1979), which suggests that lots 11 and 12 may have been in place in sec. 32 as early as 1879. This order focuses upon lands (Tract D) contiguous with lot 11 and implicitly holds that Tract D was in place in 1879 when a meander of the Snake River was run in secs. 31 and 32. 2/ If Tract D was in place, it is entirely possible that lot 11, immediately to the west of Tract D, was also.

Because the record is inadequate to determine whether Secretarial order of July 5, 1921, was effective to withdraw from location lots 8-12 in sec. 31, we set aside BLM's decision to the extent it relied on this order to invalidate the Barf #1-#5 claims. On remand, BLM should determine whether lands now described as lots 8-12 in sec. 31 and lots 8-10 in sec. 32 were an island and at what time they lost this status. The record would be aided by a determination of the navigability of the Snake River in secs. 31 and 32 as of the date of statehood and by information regarding the causes (accretion, reliction, avulsion, etc.) of change in Tucker Island. 3/

BLM's decision places the Barf #8 claim in sec. 32, T. 4 S., R. 33 E. Our review of the location notice places this claim in sec. 31. In either case, ample authority is cited by the agency to conclude that this claim is null and void ab initio.

In all other respects, BLM's decision is affirmed. 4/

2/ We reach this conclusion because the Christman court awarded Tract D to the upland patentee, having found that the 1879 survey of John B. David did "not deviate so greatly from the actual sinuosities of the Snake River to be established by the survey as to cause the disputed lands to remain in public domain." This finding necessarily assumes that Tract D was in existence in 1879. The reasoning used by the court reflects its awareness of Jeems Bayou Fishing & Hunting Club v. United States, 260 U.S. 561 (1923), wherein the Supreme Court held that when a meander line is shown to be a gross error tantamount to fraud because no water ever existed at or near
the place indicated, then any land beyond the meander line is to be treated as unsurveyed land, title to which remains in the Government. See United States v. 295.90 Acres of Land, 368 F. Supp. 1301, 1306 (M.D. Fla. 1974), aff'd, 510 F.2d 1405 (5th Cir. 1975).

3/ The State Office may also wish to consider whether the notation rule applies in this instance. David Cavanaugh, 89 IBLA 285, 92 I.D. 564 (1985).

4/ During the pendency of this appeal, the Idaho State Office filed with the Board on Mar. 26, 1991, a memorandum which states in toto:

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is affirmed in part, set aside in part, and remanded.

James L. Byrnes
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

fn. 4 (continued)

"We have not received a 1989 or 1990 Intention to Hold or Affidavit of Assessment Work for the Red #1 thru #20 and the Barf #1 thru #8 claims (IMC 128855-128882) as required. Please remand the case file and we will issue a decision deeming these claims abandoned and void."

Appellant does not appear to have been served with this memorandum, contrary to 43 CFR 4.27(b).

The message of the Idaho State Office, if accurate, would render moot the dispute described above and obviate the need for further inquiry by BLM as to the status of certain lands for purposes of resolving this case. Upon the failure of a mining claimant to timely make the annual recordation filings required by section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1988), affected claims are deemed abandoned and void as a matter of law. United States v. Locke, 471 U.S. 84 (1985). Nor does the pendency of administrative review before the Board relieve a claimant of statutorily imposed filing requirements during such period, in the absence of the grant of deferment from assessment work in acordance with 30 U.S.C. § 28b-e (1988) and 43 CFR 3852.0-3.

If BLM, upon re-examination of its records, finds that appellant has failed to make his annual filings, it may issue a decision setting forth the relevant facts and law. Any such decision shall be appealable to this Board.